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In the Supreme Court of the United States

October Term, 1982

GEORGE W. DUNNE, et al.,

Petitioners,

vs.

CARL R. HANSEN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the federal courts may intrude into local government affairs by revising an apportionment plan for election of local officials, where the local government has already enacted a reapportionment plan with only *de minimis* variation from numerical equality, and where the district court's finding of a *prima facie* case is merely based on the possibility of slightly reducing that variance.

Whether the district court may intervene in local government affairs by substantially increasing the size of a local legislative body, where no *prima facie* case of vote dilution has been shown, and where, moreover, any variance is justified by local government policies and concerns.

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In the Supreme Court of the United States

October Term, 1982

GEORGE W. DUNNE, et al.,

Petitioners,

vs.

CARL R. HANSEN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, George W. Dunne and the other city members of the Cook County Board of Commissioners,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on June 10, 1982.

[1] In addition to George W. Dunne, the petitioners are: city Commissioners Matthew Bieszczat, Mildred Casey, Matt Rupa, Frank W. Chesrow, Ruby Ryan, John H. Stroger, Jr., Irene C. Hernandez, Jerome Huppert, and Martin Tuchow. In addition to Carl R. Hansen, the respondents are: suburban Commissioners Bernard Carey (replaced Joseph Tecson), Mary M. McDonald, Ronald R. Larson, Harold L. Tyrrell, and Joseph I. Woods. Stanley Kusper, Clerk of the Circuit Court of Cook County, was a defendant below.

When this case was initially filed in 1973, as *Sutton v. Dunne*, the plaintiffs were: James W. Sutton, Jr., Rosemary Wiedl, and James E. Newquist. The defendants in the 1973 case were: Commissioners George W. Dunne, Matthew W. Bieszczat, Charles S. Bonk, Charles F. Chaplin, Frank W. Chesrow, William M. Erickson, Charles J. Grupp, Jr., William Harvey, Jerome Huppert, Lillian Piotrowski, Ruby Ryan, John H. Stroger, John J. Touhy, Joseph I. Woods, and Floyd T. Fulle.

OPINIONS BELOW

The opinions of the District Court are reported as *Sutton v. Dunne*, 365 F. Supp. 483 (N.D. Ill. 1973) and 529 F. Supp. 312 (N.D. Ill. 1981). The later case, the subject of this petition, is included as an Appendix (A-1) to the petition. The opinion of the Court of Appeals is not yet reported, and is included as an Appendix (A-2) to the petition.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was rendered on June 10, 1982. The Petition for Rehearing and Suggestions in Support of Rehearing *En Banc* was denied on October 5, 1982. (A-3) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Art. I, §2:

> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const., Amend. XIV, §1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Const. 1970, Transition Schedule, §5(b):

> (b) In Cook County, until (1) a method of election of county board members different from the method in existence on the effective date of this Constitution is approved by a majority of votes cast both in Chicago and in the area outside Chicago in a county-wide referendum or (2) the Cook County Board by ordinance divides the county into single member districts from which members of the County Board resident in each district are elected, the number of members of the Cook County Board shall be fifteen except that the county board may increase the number if necessary to comply with apportionment requirements. If either of the foregoing changes is made, the provisions of Section 3(a) of Article V shall apply thereafter to Cook County.

STATEMENT OF THE CASE

This case involves a challenge to the apportionment of elected members of the Board of Commissioners of Cook County, Illinois. Cook County consists of two multi-member districts: (1) that part of Cook County located within the City of Chicago (hereinafter "city") (2) that part of Cook County outside the City of Chicago (hereinafter the "suburbs"). The county board consisted of fifteen members, ten elected from the city, five from the suburbs, for over 100 years, until the district court's order in this case in 1973, which increased the Board to 16.

Jurisdiction of the federal courts was invoked pursuant to the Fourteenth Amendment, and 42 U.S.C. §1983. In its order of December 23, 1981, the district court (1) ordered the Board of Commissioners of Cook County to reapportion itself so that commencing with the board elected on November 2, 1982, the voters of the City of Chicago will elect ten members of the board, and the voters residing in Cook County outside the City of Chicago will elect seven members of the board; and (2) ordered the board to adopt an ordinance so reapportioning itself within 15 days. The additional two members of the Board were elected during the regular 1982 elections, on the basis of the court's 10-7 apportionment plan, but the court on Jan. 6, 1982, stayed the part of his order requiring the Board to actually enact the ordinance.

The 1973 Case

In 1973 certain suburban voters asserted that they were denied appropriate representation on the board based on population figures established by the 1970 Decennial census. The district court granted summary judgment in the suburban voters' favor in *Sutton v. Dunne*, 365 F. Supp. 483 (N.D. Ill. 1973) and ordered that an additional member be elected by suburban voters and seated on the board. On October 15, 1973 the board adopted an ordinance implementing the district court's reapportionment plan, and the 1974 and 1978 board elections were held on the basis of that ordinance. (A-1, p. 1a-2a)

The 1981 Case

On November 2, 1981 the board adopted an ordinance, amending the October 15, 1973 ordinance, to provide that nine commissioners be elected from the city, and six from the suburbs. This change brought the apportionment for election of the Board into closer conformity with population statistics reflected by the 1980 census, which were no longer accurately reflected by the 1973 plan. (A-1, p. 2a)

Shortly thereafter, on November 24, 1981 the suburban members, as voters and elected members of the board, filed a motion for leave to file a cross-claim against the city members of the board. (Movant's Motion for Leave) The cross-claim challenged the reduction of board membership required by the November 2, 1981 ordinance on the following grounds:

(1) The ordinance constituted a violation of the district court's order of October 11, 1973 setting the board's membership at 16,

(2) the ordinance constituted a violation of the suburban members' rights under the Fourteenth Amendment by diluting suburban voters' representation on the board,

(3) the ordinance violated the Illinois Constitution, Transition Schedule, Section 5(b).

The cross-defendants, who were the elected city members of the board in their official capacity, filed objections to the cross-claim on December 1, 1981. On December 7, 1981 the proposed cross-claim was withdrawn, and a "Motion to Modify Decree" was filed by the suburban members.

The "Motion to Modify Decree" asserted the existence of the October 11, 1973 order and the November 2, 1981 ordinance, and alleged a violation of suburban voters' Fourteenth Amendment rights based on the population figures generated for the county by the 1980 decennial census. Based on the foregoing, the suburban members asserted that the correct allocation of seats on the board should be nine to the city and seven to the suburbs. The suburban members also asserted that the reduction of board seats from sixteen to fifteen, accomplished by the November 2, 1981 ordinance was violative of the Illinois Constitution. (Movants' Motion to Modify)

On December 18, 1981 the County Official Defendants' Answer and Affirmative Defenses to the Motion was filed. (Deft. Answer) The answer denied the various legal conclu-

sions and allegations set out in the motion to modify and asserted:

1. That the board had complied with the district court's order of October 11, 1973 by adopting an ordinance in conformity with that order; and that the November 2, 1981 ordinance was not a violation of the prior order.

2. That the reported population figures alleged by the suburban members were not adjusted for the known undercount of minority groups.

3. That the motion to modify failed to state grounds or claims upon which relief could be granted, the differential between a 15 member board as against a 17 member board being so minimal that no constitutional claim could be stated.

4. That the motion failed to assert any invidious discrimination resulting from the miniscule disparity on account of the 15 member board.

5. That the suburban members lacked standing to bring the claims in their official capacity.

6. That the addition of commissioners would cost the county approximately $80,400 per commissioner, per year.

No evidence was taken, but the district court did conduct a series of pre-trial conferences between the parties.

Because the Census Bureau had not yet estimated percentages of the undercount of the 1980 census, the district court used the 1980 figures, adjusted by the percent of undercount estimated for the 1970 census. These figures, concededly inaccurate, would be more accurate than the raw 1980 statistics. (A-1, p. 2a-3a)

The statistics, so adjusted, are as follows (A-1, p. 3a):

City of Chicago

	1980 Population	Adjustment	1980 Adj. Population
White	1,143,426	1.9%	1,165,151
Nonwhite	1,961,635	7.7%	2,004,960
	3,005,061		3,170,131

Suburban Cook County

White	1,988,406	1.9%	2,026,185
Nonwhite	259,723	7.7%	279,720
	2,248,129		2,305,905

Total Cook County = 5,476,036

1980 Adjusted Population

City	3,170,131	=57.89%
Suburban	2,305,905	=42.11%
	5,476,036	

Based on these figures, the 9-6 apportionment enacted by the Board would result in a 2.11% overrepresentation for the city and a 2.11% underrepresentation for the suburbs. The court's own suggestion of a 10-7 formula would slightly reduce the variance to ±.93%.

On December 22, 1981 the district court issued its "Memorandum Opinion", and the next day, its order requiring the membership of the board to be increased to seventeen, ten members elected from the city, seven from the suburbs. (A-1) The district court ruled that the differential of ±2.11% between the suburban voters and the city voters was sufficient to establish a *prima facie* case of Fourteenth Amendment violation. The court then ruled that the costs to the county of additional members to the board, $80,400 per year, per additional member, was not an adequate justification for the differential. (A-1, p. 5a)

The Court of Appeals affirmed, holding that the possibility of reducing the variance warranted judicial intervention in the apportionment of the Cook County Board, and further that the historical and economic factors urged by the city members did not justify the Board's plan. Petitioners now seek certiorari to review that decision.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT BY APPLYING THE WRONG STANDARD FOR EVALUATION OF APPORTIONMENT FOR THE ELECTION OF LOCAL GOVERNMENT OFFICIALS, AND CONSEQUENTLY RESULTS IN UNWARRANTED INTRUSION OF THE FEDERAL COURT INTO LOCAL GOVERNMENT AFFAIRS.

This case is of exceptional importance because the decision below squarely conflicts with this Court's consistently reiterated declaration of the parameters of permissible federal judicial intervention in reapportionment for state political subdivisions. As the dissenting opinion in this case recognized, this Court has repeatedly emphasized that judicial intervention is unwarranted and impermissible, where reapportionment by a state or local government legislative body results in only *de minimis* variation from numerical equality.

Nevertheless, the panel majority in this case has held that a variance of only ±2.11% is a "substantial" variation, and that judicial intervention to reduce the variance to ±.93% by adding two commissioners was appropriate. The majority reached its conclusion not by addressing the variance itself, but by merely postulating that a different apportionment could come closer to numerical equality. This purported analysis not only begs the very question at issue, but also erroneously relies upon the theory that

judicial intervention is always warranted if a numerical deviation can be reduced. This principle is applicable, however, only to Congressional reapportionment under Article I, Section 2 of the United States Constitution (*Kirkpatrick v. Preisler*, 394 U.S. 596 (1969), relied upon by the majority), and not under the Fourteenth Amendment.

The panel majority thus relied upon the wrong standard. Federal court intervention in reapportionment cases involving the election of local officials is permissible only if a *prima facie* case of an equal protection violation is demonstrated. As the dissenting opinion so aptly states, there is a strong presumption in favor of a legislatively determined reapportionment. *Upham v. Seamon*, _____ U.S. _____, 102 S.Ct. 1518, 1521 (1982); *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *White v. Weiser*, 412 U.S. 783, 795 (1973). The panel majority in the instant case has erroneously equated the possibility of reducing a deviation with the existence of a *prima facie* case of vote dilution. Such a conclusion departs from this Court's consistent holdings to the contrary.

The Fourteenth Amendment requires that the election of state and local legislative officials be conducted with districts apportioned substantially according to population. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County, Texas*, 390 U.S. 474 (1968). Mathematical exactness, however, is both unworkable and unnecessary. Consequently, this Court declared in *Gaffney v. Cummings* that:

> minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. 412 U.S. at 745.

This Court recognized that:

> state reapportionment is the task of . . . those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection

Clause when only minor population variations among districts are proved. 412 U.S. at 751.

In *Gaffney* a *prima facie* case of a violation of equal protection was not established, either by the existence of numerical deviations, or by the possibility of formulating a plan with lower deviations. 412 U.S. at 740-741. The unmistakable mandate of *Gaffney* is that even if the State's plan is not numerically the closest to the ideal population distribution, the courts should not intervene if the allocation has been made within "tolerable limits." 412 U.S. at 754.

Under the plan enacted by the Cook County Board, 15 commissioners were to be divided 9 and 6 between Chicago and suburban Cook County with a variance from population equality of only 2.11% each way. The district court plan would add two commissioners to the Board, splitting it 10 and 7, with a variance each way of .93%. Both computations are based upon 1980 census figures, modified to reflect the percentage of the population undercount which had been estimated for the 1970 census.

The percentage variation under the Board's plan is *de minimis* on its face, as found in the dissenting opinion, and judicial intervention was therefore unwarranted. Moreover, the majority incorrectly states in a footnote that "neither party challenges the accuracy" of the figures upon which these percentages are based. (A-2, n. 1, p. 11a) On the contrary, the district court merely used the approximations of adjusted figures, which it correctly asserted would be "closer to the actual figures than the raw data." (A-1, p. 2a-3a) As petitioners argued in their brief below, these figures are the most accurate available, but they are still inaccurate, exacerbating the inappropriateness of judicial intervention when the percentages are so close.

This Court in *Gaffney* emphasized the unreliability of any census count, holding that therefore minor deviations cannot be deemed significant:

> it makes little sense to conclude from relatively minor "census population" variations among legislative districts that any person's vote is being substantially diluted. The "population" of a legislative district is just not that knowable to be used for such refined judgments. 412 U.S. at 746.

Indeed, this Court expressed its:

> doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decision making in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature. 412 U.S. at 749.

Moreover, deviations substantially greater than that in the instant case have been held to be *de minimis*. *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973). No case in which a plan with a variation similar to the instant case was invalidated has been found by either party, or either court, except where the plan was rejected because it increased the deviation over the previous plan, and did so for impermissible reasons. *White v. Crowell*, 434 F.Supp. 1119 (W.D. Tenn. 1977).

Contrary to the holdings of this Court in *Gaffney* and its progeny, the panel majority has created a totally new constitutional principle, purporting to distinguish, on a constitutional plane, between reapportionment plans involving multiple districts and two districts. It then holds that "the Board's 1981 plan, although perhaps an insubstantial deviation in a multi-district case, is not *de minimis* in this two district case." (A-2, p. 13a) The suggested basis for this distinction is the alleged ease in reapportionment, by changing the number of officials, in a two district plan. The majority, which, significantly, has relied upon *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), thus inappropriately considers whether a variance is "avoidable," (A-2, p. 12a) which is relevant in apportionment cases under Article 1, Section 2, but not under the Fourteenth Amendment. The

majority's analysis directly conflicts with *Gaffney* and its progeny, which explicitly stressed that the federal courts should not get involved in reapportionment litigation, merely because a plan which may be "marginally 'better' when measured against a rigid and unyielding population-equality standard" is produced. *Gaffney*, 412 U.S. at 751.

Furthermore, the panel majority not only incorrectly found a ±2.11% variance to be substantial, but also rejected the Cook County Board's justified and presumptively valid setting of the size of its own membership. *Abate v. Mundt*, 403 U.S. 182 (1971). The dissenting opinion, correctly noting that the majority examined "only the ability to reduce the deviation," emphatically states:

> This decision fails to give adequate deference to the reasoned and good faith judgment of the Board and represents unjustified and unnecessary meddling by a federal court in the affairs of a local governmental body. (A-2, p. 17a, Grant, J. Dissenting)

The dissent further disagreed with the majority's finding that the change in the Board's composition from 15 to 17 is only minor and therefore permissible. In *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 201-202 (1972), this Court emphasized that the decision as to the size of a legislative body is initially a local government matter. Disapproving of a substantial reduction of the Minnesota legislature, this Court declared that:

> We know of no federal constitutional principle or requirement that authorizes a federal reapportioning court to go as far as the District Court did and, thus, to by-pass the State's formal judgment as to the proper size of its legislative bodies . . . We have found no district court decision that has employed such radical surgery in reapportionment, *Beens* 406 U.S. at 198.

Naturally, the foregoing limitation upon "radical surgery" applies as well to the unwarranted "cloning" of the County Board members accomplished by the district court below. In this situation, where County Board

membership is increased by more than 13%, similar considerations are involved; and the district court exceeded the legitimate scope of its authority. The trifling differential asserted by the district court as authority for its interference into the County's affairs surely cannot, when viewed with the preponderating historical, political, and economic factors, be considered to constitute a legitimate exercise of federal authority in this case, since there is no showing of a disciminatory purpose to contravene the Fourteenth Amendment rights of the suburban members. This substantial increase has been effected by the court, despite the long historical precedent of a 15 member Board, despite the presumption of that number, as defined in the 1970 Illinois Constitution (Transition Schedule, Section 5(b)),[2] and despite the valid consideration of the costs of including additional officials.[3]

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[2] For more than 100 years the County of Cook has consisted of a fifteen member board having the duty and responsibility to carry on various aspects of the county's business. *County of Cook v. City of Chicago*, 311 Ill. 234, 240-42, 246 (1924), powers pre-1970 Const.; *cf. Kanellos v. Cook County*, 53 Ill.2d 161, 166 (1972), powers post-1970 Const.

The 1870 Illinois Constitution, Art. X, §7 provides:

> "The county affairs of Cook County shall be managed by a board of commissioners of fifteen persons, ten of whom shall be elected from the City of Chicago and five from towns outside of said city, in such manner as may be provided by law."

The 1970 Constitution, Art. VII, §3(c) provides:

> "Members of the Cook County Board shall be elected from two districts, Chicago and that part of Cook County outside Chicago. . ."

Transition Schedule, §5(b) provides:

> "In Cook County. . . the number of members of the Cook County Board shall be fifteen except that the county board may increase the number if necessary to comply with reapportionment requirements.

[3] The district court acknowledged that the effect of adding a commissioner to the County Board would increase the budget by $80,400 per year per additional member. The cost of the court's order to the county over the decennial is therefore in excess of $1.6 million. This increase

The panel majority has erred in affirming the unwarranted judicial intervention in this case. The Board acted to reapportion itself to reflect new population statistics, and that repportionment resulted in only *de mimimis* variances. Neither the district court nor the panel majority has accorded the requisite deference to this local government's appropriate determination of its own affairs.

A dangerous new precedent has been set, that federal courts may substitute their judgment for that of local governments whenever the court or the movant propose a plan purportedly closer to population equality. The deci-

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[3] (Continued)
comes at a time when the county is subject to the following financial stress factors:

Federal Revenue Sharing—12% cutback from the Federal Government in the County's Revenue Sharing allocation totalling $2.5 million.

Personal Property Replacement Tax—Recent legislation passed by the State Legislature may reduce the County's allocation by $2 million.

Medically Indigent Hospitalization Reimbursements—Federal and State cutbacks in the area of hospital reimbursements will be an estimated $10 million.

Recorder of Deeds - Poor housing market	
1979 Actual Revenue	$10,422,000
1982 Estimated	7,000,000
	-3,422,000
Building & Zoning - Poor housing market	
1979 Actual Revenue	$ 823,784
1982 Estimated	350,000
	- 473,784
Retail Sale of Motor Vehicles—	
Tax-High Interest Rates	
1979 Actual Revenue	$ 4,795,950
1982 Estimated	3,000,000
	- 1,795,950

Defendants' Answer,
Exhibit D - 30 -

sion below directly conflicts with this Court's enunciations, in *Gaffney* and subsequent cases, of the parameters of permissible federal court intervention in cases under the Fourteenth Amendment involving local governmental apportionment, especially where the size of a legislative body is modified. Consequently, these conflicts justify the grant of certiorari to review the judgment below.

II.

THE QUESTION IS NOT MOOT BECAUSE THE FUNCTIONING AND SIZE OF THE COOK COUNTY BOARD AND ITS APPORTIONMENT ARE AFFECTED ON AN ONGOING BASIS BY THE DECISION OF THE COURT BELOW.

Even though the election of the additional Commissioners of Cook County has already occurred, the case is not moot. The additional membership of the Board of Commissioners, and the apportionment between the city and suburbs, will be in continuing effect for the next ten years, until new census statistics make a re-evaluation necessary. Consequently the functioning of the local government of Cook County will continue to be affected by the decision below, and the controversy remains both actual and substantial. *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975).

The existence of this actual and substantial controversy warrants issuance of the writ to review the decision below.

CONCLUSION

For the reasons stated in this Petition, petitioners pray that this Honorable Court grant a writ of certiorari to review the decision below.

Respectfully submitted,

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